

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	MEMORANDUM
NO. 54590-g41B BY MICHAEL D. AND)	
DENISE L. PEARCE)	

* * * * *

A pre-hearing conference was held on the above-entitled matter on December 17, 1984. On December 27, 1984, a Memorandum was issued in this matter, stating the particulars of the conference and of the conditions under which the parties agreed that a water use permit would be issued.

The affidavit of service for the December 27 Memorandum in this matter indicates that the individual Objectors did not receive copies of the Memorandum. However, counsel Max Hansen supplied copies of the Memorandum to the Objectors, and has indicated that all of the Objectors have had a chance to review and discuss the Memorandum.

RESPONSE TO COMMENTS

Applicant Michael Pearce submitted a comment, received on January 7, 1985, correctly indicating that the parties at the pre-hearing conference had agreed to a permit condition requiring that a flow metering device be installed to monitor the new irrigation usage reflected by Application No. 54590-g41B. Therefore, proposed permit condition C (Memorandum) is amended to

CASE # 54590

correctly reflect the intention to impose metering conditions only upon that portion of water use covered by the present permit application.

Max A. Hansen, counsel for Objectors Campbell, Meine, Blake, and Gaasch, submitted comments received on January 10, 1985.

Mr. Hansen suggests that an additional condition be placed upon any permit which is issued in this matter to indicate that the permit is subject to revocation by the Department of Natural Resources and Conservation (hereafter, "Department"), and to the right of the Department to enter onto premises of the Permittee for investigative purposes. This proposed condition is a standard condition, which merely states statutorily-granted Departmental rights. See MCA § 85-2-314 and MCA § 85-2-115. Therefore, the standard permit condition which embodies the proposed language has been added as permit condition E.

Mr. Hansen also suggests that the permit should reflect the Applicant's agreement to maintain an access port to his well so that the static water level in the well may be accurately measured. Proposed permit condition D has been amended to reflect the agreed-upon maintenance of an access port.

Mr. Hansen additionally suggests that the last sentence of proposed condition C be reworded to read, "These records shall be submitted to the Department by December 1 of each year or at such other times as the Department requests", and that the relevant language in proposed condition D also be so amended, so that it is clear that the Permittee will be responsible for submitting data to the Department on a yearly basis but also upon Department

CASE # 54590-2

request. The wording of proposed conditions C and D has been amended to reflect that the Permittee will submit the specified data yearly and also upon Departmental request.

Unless further amended in response to comment, a permit will be issued in this matter as follows:

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 54590-g41B is hereby granted to Michael D. and Denise L. Pearce to appropriate 960 gallons per minute up to 336 acre-feet of water per year for new sprinkler irrigation of 160 acres; 14 acres in the S $\frac{1}{2}$ S $\frac{1}{2}$ N $\frac{1}{2}$ of Section 13, Township 8 South, Range 9 West, and 146 acres in the S $\frac{1}{2}$ of Section 13, Township 8 South, Range 9 West, all in Beaverhead County Montana. The point of diversion of this appropriation is the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12, Township 8 South, Range 9 West, Beaverhead County, Montana. The source of supply is groundwater, to be diverted by means of a pumped well. The period of use for this Permit shall be April 15 to October 15, inclusive, of each year. The priority date for this Permit shall be May 16, 1984, at 9:59 a.m.

This Permit will be used in conjunction with Beneficial Water Use Permit No. P 035955 by Michael and Denise Pearce, for a total combined withdrawal of no more than 2,960 gallons per minute and 1,008 acre-feet per year.

This Permit is issued subject to the following express terms, conditions, restrictions, and limitations:

CASE # 54590
3

A. The water rights evidenced by this Permit are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize diversions by the Permittee to the detriment of any senior appropriator.

B. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this Permit. Nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by the exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittee shall install an adequate flow metering device in order to record the flow rate and volume of water diverted from the well pursuant to this permit. During the irrigation season, the Permittee shall keep a written record of the date, the accumulated volume withdrawn, and the flow-rate at the time of reading. The readings shall be taken on a monthly basis unless the Department requests more frequent reading for testing purposes. These records shall be submitted to the Department by December 1 of each year and at such other times as the Department may request.

D. The Permittee shall take static water level measurements on April 15 of each year, prior to commencing irrigation. For this purpose, the Permittee shall maintain an access port to his well. The Permittee shall also take static water level measurements immediately subsequent to the end of irrigation each

CASE # 54590
4

year, and on November 15 of each year, unless the Department notifies the Permittee that more frequent measurements are necessary. The Permittee shall keep a written record of these measurements and submit them with the flow meter record each year, and upon Department request.

E. This Permit is granted subject to the right of the Department to modify or revoke the Permit in accordance with MCA § 85-2-314, and to enter onto the premises for investigative purposes in accordance with MCA § 85-2-115.

NOTICE

This Memorandum is offered for the review of all parties of record. Any response or comment must be filed with and received by the Department no later than 4 days after receipt of this Memorandum.

DONE this 16th day of January, 1985.

Peggy A. Elting
Peggy A. Elting, Hearing Officer
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6612

CASE # 54590

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on February 16, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Michael D. and Denise L. Pearce, Application No. 54590-g41B, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Michael D. & Denise L. Pearce
1205 Flynn Lane
Dillon, MT 59725
2. John Warren
Attorney
P.O. Box 28
Dillon, MT 59725
3. Max A. Hansen, P.C.
Attorney at Law
P.O. Box 1301
Dillon, MT 59725
4. Laden Ranch
Ella Laden and Timothy Laden
1125 Laden Lane
Dillon, MT 59725
5. Robert Meine
3525 Flynn Lane
Dillon, MT 59725
6. Peter A. Gaasch, Jr. and
James L. Campbell
3825 Flynn Lane
Dillon, MT 59725
7. Stanley J. and Katherine Ripley
Box 245
Dillon, MT 59725

CASE # 54590

8. James Blake
2875 Beaverhead Lane
Dillon, MT 59725

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by *Hans Stan*

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 16th day of January, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Jim P. Gilman
Notary Public for the State of Montana
Residing at HELENA, Montana
My Commission expires 1-21-1987

CASE # 54590

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) ORDER
NO. 54590-G41B BY MICHAEL D. AND)
DENISE L. PEARCE)

* * * * *

On April 2, 1984, the Department of Natural Resources and Conservation issued a Show Cause Order to Objector Montana Power Company (hereafter, "MPC").

I. Memorandum of Cause by MPC

A. MPC's response to the Show Cause Order also reasserted several of their arguments made in response to the Proposal for Decision in Don Brown. The Department incorporates its response to MPC's arguments numbered 2, 3, 6, 8, 10 as set forth in the Final Order in Don Brown, April 24, 1984.¹

¹ These MPC arguments are:

2. Unappropriated water in the proposed source is non-existent.
3. Property rights will be adversely affected.
6. Evidence shows the Power Company's water rights are presently not being satisfied.
8. The Order changes the statutory burden of proof.
10. All Final Orders issued by the Department are afflicted with errors of law and are otherwise improper, and the Power Company has appealed every Final Order which adversely affects its rights.

MPC's argument number 10 is too vague to be responded to with particularity. MPC suggests the hearing officer look at the docket as evidence that MPC has presented arguments that Don Brown is afflicted with errors of law or otherwise improper. MPC's complaint, however, is still too vague to provide the Department any substantive clue as to the errors MPC claims infect Don Brown.

C B. MPC's most fundamental objection is that the Show Cause Orders are beyond the DNRC authority. This is incorrect. The Department will first address this issue, settling the arguments numbered 1 and 11 raised by MPC.²

(1) Statutory Authority

Among the duties mandated to be carried out by the Department by broad legislative delegation of authority is MCA § 85-2-112(1), (2).

"The Department shall:

(1) enforce and administer this chapter and rules adopted by the board under 85-2-113, subject to the powers and duties of the Supreme Court under 3-7-204;.

(emphasis added)

C (2) prescribe procedures, forms, and requirements for applications, permits, certificates...and proceedings under this chapter...". (emphasis added)

The only limiting language refers to MCA § 3-7-204. That section refers to the supervision by the Montana Supreme Court of the "activities of the water judge, water masters, and associated personnel in implementing this Chapter and Title 85, Chapter 2, Part 2..." Additionally, the statute provides for the Supreme Court to pay the expenses of the water court and staff. Clearly, MCA § 3-7-204 has no bearing on Departmental authority to administer the new appropriations program.

² These MPC objections are:

1. The Department has acted beyond its authority.
11. The Order is a denial of due process and equal protection guaranteed by both the federal and state constitutions.

With regard to enforcement and administration of the Water Use Act, Chapter 2, there is no limiting statutory provision. The Department must act, in furtherance of the Act's policies and according to its own procedural guidelines under the authority of the statutes and limited only by applicable Board Rules.

The Board has adopted, effective April 27, 1984, procedural rules for water right contested case hearing.³ Thus, currently, the guiding statutory and regulatory authority is the Water Use Act, the Administrative Procedures Act, and the Board Rules. MCA Title 85, Chapter 2; MCA § 85-2-121; MCA § 2-4-601 et seq.; Administrative Rules of Montana (hereafter, "ARM") Chapter 12, Subchapter 2.

The Department having been expressly delegated the duty to enforce and administer the Water Use Act, Chapter 2, the pertinent provisions thereof frame the question of administrative authority herein. The Water Use Act (hereafter, the "Act") specifies as one of its purposes, the implementation of a constitutional mandate. MCA § 85-2-101(2).⁴

³ The result reached herein would be the same under the previously effective Attorney General Model Rules 8-21, governing contested cases. Administrative Rules of Montana §§ 1.3.211-1.3.225.

⁴ § 85-2-101(2) provides: "A purpose of this chapter is to implement Article IX, section 3 (4) of the Montana constitution, which requires that the legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights. The legislature declares that this system of centralized records recognizing and establishing all water rights is essential for the documentation, protection, preservation, and future beneficial use and development of Montana's water for the state and its citizens and for the continued development and completion of the comprehensive state water plan."

C The specific portions of the Act involved herein are found in Part 3 of the Act. Therein, with certain irrelevant exceptions, a person's right to appropriate water is limited to being obtained through compliance with the procedures for applying for and receiving a permit from the Department.

After July, 1973, a person may not appropriate water except as provided in this chapter. A person may only appropriate water for a beneficial use. A right to appropriate water may not be acquired by any other method, including by adverse use, adverse possession, prescription, or estoppel. The method prescribed by this chapter is exclusive.

C MCA § 85-2-301 (1983). Those procedures deemed essential for proper administration and enforcement of the constitutional mandate are specifically detailed in the Act. See, e.g.: evidentiary provision in § 85-2-121 MCA (1983); notice requirements of MCA § 85-2-307; hearing requirements of MCA § 85-2-309 (1983). Similarly, those substantive criteria intended to limit and define delegated departmental duties are explicit. MCA § 85-2-311, MCA § 85-2-402.⁵

Otherwise, of course, it is established that the Act did not change the substantive rules and policies of Montana Water Law, but merely gave the Department authority to administer the collection of rights and responsibilities commonly called "water law" similarly to previous water right administration by District

⁵ Hence, the constitutional requirement of meaningful standards to guide agencies in exercising their delegated authorities is clearly met. ART. III § 1, Mont. Const. See, discussion below. MONT. CONST. art. 3 § 1.

C Court. Castillo v. Kunneman, 39 St. Rep. 460, 642 P.2d 1019 (1982). Where the legislature intended to change previous substantive law, or to clarify it, the substantive features of long-time common law were incorporated into the Act. See, §§ 85-2-102(1)(2), 85-2-311, 85-2-402 MCA (1983). Otherwise, the only differences between pre-Act law, and post-Act law, other than those expressly codified in the Act, would be those arising from the difference in the nature of an administrative proceeding, and a proceeding in a District Court. (See, Interlocutory Order, Beaverhead Partnership, re: Burden of Proof, for an example of shifting burden of proof necessarily concomitant to the procedural differences between a District Court action and an administrative proceeding.)

C The Act prescribes certain mandatory procedures the Department must follow in applying the substantive determinations required in granting, denying, or conditioning applications for permits and change authorizations. MCA §§ 85-2-307, 85-2-309, 85-2-310, 85-2-402. To impose additional procedural requisites upon the Department would be contrary to the well-known maxim "expressio unius est exclusio alterius". That is, where procedural specifics are imposed on certain Department actions, and excluded in other grants of power, it is assumed that those provisions were intentionally excluded. State ex rel. Dragstedt v. State Board of Education, 103 Mont. 336, 62 P.2d 330 (1936).

C The Department's authority to strike the instant objection without hearing arises by necessary implication from these statutes, and the general laws defining and circumscribing the powers and duties of the Department. See, State ex rel. Dragstedt v. State Board of Education, supra.

Determination of whether the MPC objections are valid has been expressly delegated to the administrative discretion of the Department. Where an objection is deemed invalid, the Department has no duty to hold a hearing thereon, and, further, the determination of the validity of the objection is solely within the agency's discretion. "If the department determines that an objection to an application for a permit states a valid objection to the issuance of the permit, it shall hold a public hearing on the objection...". MCA § 85-2-309.

C The only statutory limitation to guide the agency's discretion in determining an objection's validity is the legislative standard for minimum contents of objections.⁶

The objection must state the name and address of the objector and facts tending to show that there are no unappropriated waters in the proposed source, that the proposed means of appropriation are inadequate, that the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation, that the proposed use of water is not a beneficial use, or that the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. MCA § 85-2-308.

Interpretation of § 85-2-308 MCA (1983) must be consistent with § 1-2-106 MCA (1983):

C ⁶ Further, the objection, to be timely, must be filed within the time limit specified by the Department in the public and individual notice on the application. MCA § 85-2-308.

Words and phrases used in the statutes of Montana are construed according to the content and the approved usage of the language, but technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law...are to be construed according to such peculiar and appropriate meaning or definition (emphasis added).

Because the common law of the state has given full dimension to the bare-boned water use statutes, the statutory terms have acquired such an appropriate meaning, e.g.: "beneficial use", Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898); Atchison v. Peterson, supra; Allen v. Petrick, 69 Mont. 373, 222 P. 451 (1924); Toohy v. Campbell, 24 Mont. 13, 60 P. 396 (1900), appropriative "intent"; Featherman v. Hennessey, 42 Mont. 535, 115 P. 983 (1911); Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912); St. Onge v. Blakely, 76 Mont. 1, 245 P. 532 (1926); Toohy v. Campbell, supra; "adverse affect"; Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940); unappropriated waters; Carey v. Department of Natural Resources and Conservation, _____ St. Rep. _____ (1984); Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 89 ALR 200 (1933); Ide v. United States, 263 U.S. 497 (1924).

Hence, in determining the validity of objections, the Department must apply the common law and statutory law of the Act. Application of that law shows that MPC's objections are not valid. See, Don Brown, Final Order.

Whether the facts on an objection tend to show any of the required criteria is a mixed question of fact and law. The facts necessary to allege such a tendency are frequently complicated

C and technical matters within the Department's expertise, involving determination of the source of supply for the proposed use, quantification of water in that source, quantities of the objector's water rights and the quantity and nature of the depletive effects of the proposed use. The legal issues involve whether the objector has stated a legally protectible interest by virtue of the facts alleged in the objection. Clearly these issues fall within the reasoning set forth in Burke v. South Phillips County Co-operative State Grazing District, 135 Mont. 209, 339 P.2d 491 (1959):

C Where the question involved is within the jurisdiction of an administrative tribunal which demands the exercise of sound administrative discretion requiring the special knowledge, experience and services of trained officers to determine technical and intricate matters of fact, and where a uniformity of ruling is essential to comply with the state's policy and the purposes of the regulatory statute on review by the court of such decisions by such authorities, the courts will require only so far as to see whether or not the action complained of is within the statute and not arbitrary or capricious. At 218.

C In summary, the Department must act in furtherance of the policy of the Montana Water Use Act in administering and enforcing the Act. § 85-2-101 MCA (1983). That policy, when read in conjunction with the remainder of the Act and the one hundred year old case law interpreting prior (but similar) statutes, clearly defines the substantive water law and policies to be applied by the Department in administering the Act. Procedurally, the Department is, of course, limited only by the Montana Administrative Procedures Act, and applicable provision

of the Montana and United States Constitutions. The Department's actions are proper according to all of these applicable substantive and procedural limitations.

Given the Department's specific authority to determine the validity of objections, and the exhaustive analysis of Don Brown, it is clearly within Departmental authority to strike MPC objections, using whatever fair procedures the Department deems appropriate to the case.

(2) Constitutional Authority

Having demonstrated the clear statutory authority for dismissing MPC's objections without hearing, the only remaining roadblock would be if this delegated authority were unconstitutional. It is not. The legislative authority to so delegate stems from a direct constitutional mandate that, "The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records". MONT. CONST. art. 9, § 3, paragraph (4).

The issue is whether the legislature has broached the Montana Constitution's fundamental structure of a tripartite government by delegating unbridled discretion to an agency, i.e., whether the agency is delegated fundamentally legislative functions.

The power of the government of this state is divided into three distinct branches - legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted. MONT. CONST. art. 3, § 1.

Of course, the analysis begins with the fundamental notion that an act is presumed constitutional, prima facie. State v. Stark, 100 Mont. 365, 52 P.2d 890 (1935). The test for proper legislative delegation of authority to an administrative agency was set out in Bacus v. Lake County, 138 Mont. 69, 354 P.2d 1056 (1960); Douglas v. Judge, 174 Mont. 32, 568 P.2d 530 (1977); and recently affirmed as controlling in T. & W. Chevrolet v. Darvial, 39 St. Rep. 112 (1982). The Court stated in Bacus:

...When the legislature confers authority upon an administrative agency it must lay down the policy or reasons behind the statute and also prescribe standards and guides for the grant of power which has been made to the administrative agency. The rule has been stated as follows:

'The law making power may not be granted to an administrative body to be exercised under the guise of administrative discretion. Accordingly, in delegating powers of an administrative body with respect to the administration of statutes, the legislature must ordinarily prescribe a policy, standard, or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion with regard thereto, and a statute or ordinance which is deficient in this regard is invalid....'

...In the case of Chicago, M. & St. P.R. Co. v. Board of R.R. Comm'rs, 76 Mont. 305, 314, 315, 247 P.162, 164 this court has stated:

'We think the correct rule as deduced from the better authorities is that if an act but authorizes the administrative office or board to carry out the definitely expressed will of the Legislature, although procedural directions and the things to be done all specified only in general terms, it is not vulnerable to the criticism that it carries a delegation of legislative power.' This rule has been approved in Northern Pacific R. Co. v. Bennett, 83 Mont. 483, 272 P. 987; Barbour v. State Board of Education, 92 Mont. 321, 13 P.2d 225; State ex rel. City of Missoula v. Holmes, 100 Mont. 256, 47 P.2d 624, 100 A.L.R. 581; State v. Andre, 101 Mont. 366, 54 P.2d 566; State ex rel. Stewart v. District Court, 103 Mont. 487, 63 P.2d 141; and Thompson v. Tobacco

Root Co-op State Grazing District, 121 Mont. 445, 193 P.2d 811. See also State v. Johnson, 75 Mont. 240, 243 P. 1073. At 78 (citations omitted), 80.

The Water Use Act falls into the category described above, wherein the legislature has delegated to the Department authority to carry out the definitely expressed will of the legislature. Although the procedural directions are expressed in only general terms when such is the case, the agency is free to use its discretion procedurally. State v. Stark, supra.

In T & W Chevrolet, supra, the court applied the test of Bacus and Douglas, and found that a statute and administrative regulations thereunder designed to curb "unfair or deceptive acts or practices in the conduct of any trade or practice..." was not so vague as to be an unconstitutionally prohibited delegation of authority to the Montana Department of Commerce, the Federal Trade Commission or the Federal Courts. In doing so, the court pointed out that the nature of the practices sought to be prohibited demanded the use of general language, but that the well developed case law, amassed over 30 years, had sufficiently given shape and definition to the terms of the act so as to vest the general terms with the requisite meaning for the agency to appropriately administer the act.

The T & W Chevrolet case summarized the holdings in Douglas and Bacus as holding that, "...a legislature must prescribe with reasonable clarity the limits of power delegated to an administrative agency". At 1369. In citing to a Washington case, the T & W court quoted the following language:

...The language of the amended federal act...has been with us since 1938. The federal courts have amassed an abundance of law giving shape and definition to the words and phrases challenged by respondent. Now, more than 30 years after the Supreme Court said that the phrase 'unfair methods of competition' does not admit to 'precise definition', we can say that phrase, and the amended language has a meaning well settled in federal trade regulation law... The phrases 'unfair methods of competition' and unfair or deceptive acts or practices have a sufficiently well established meaning in common law and federal trade law, by which we are guided, to meet any constitutional challenge of vagueness. At 1370.

Further, the Court pointed out:

When reviewing the constitutionality of a given law, it is important to keep in mind the basic premise, well recognized in Montana, that the constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt. T & W Chevrolet, at 1370.

In the instant case, the vast bibliography of Montana Water Law more than sufficiently defines the terms used in the Water Use Act so that the Department may readily ascertain the specific and plain language thereof, and administer the same in accordance with the legislative intent. Hence, the Department has no doubt that the authority it has been delegated by the Act is fully within the legislature's constitutional authority to delegate, was properly delegated, and has been properly exercised herein. Having applied the well articulated Montana law to the allegations of MPC, the Department determined that the objections were not valid, and under the clear terms of the Water Use Act,

MCA § 85-2-309, no hearing thereon is necessary.'

MPC's due process argument is without merit. MPC was given more than ample opportunity to state a valid objection, and simply failed to do so. The Department has afforded MPC far more procedural protection than is constitutionally necessary, under both the state and federal constitutions. The Department made clear why MPC's objection is not valid, having provided MPC specific basis to respond to in the show cause order.

MPC, instead, has merely repeated vague shot-gun arguments alleging that the Department does not have the authority expressly delegated to it by § 85-2-309 MCA (1983).

The fair notice and meaningful opportunity to respond requirements of due process have been met several times over. See, Abrams v. Feaver, 41 St. Rep. 1588, 685 P.2d 378 (1984); Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983 (1972).

MPC's equal protection allegation is similarly frivolous. To accede to MPC's demands would in fact be setting MPC above the law, denying other objectors equal protection by immunizing MPC from the requirements the class of all other objectors must meet; stating a valid objection in order for the right to a hearing to

⁷ Contrast this situation with Douglas v. Judge, 174 Mont. 32, 568 P.2d 530 (1977), where the court found that a delegation of authority to loan state money based on an unbridled agency determination of a project being "worthwhile" was an unconstitutional delegation of authority. There, the substantive issues had not been so long subject to common law definition as to have already been shaped and defined prior to the statutory enactment.

C arise. See, e.g.: Application for Water User Permit No. 53972 by David A. & Linda J. Seed, Application for Beneficial Water Use Permit No. 47841-g76M by John A. March, Jr..

C. MPC alleges that the Department has an independent duty to ascertain the viability of each application, regardless of whether the Department's duty to hold a hearing arises. See, MPC issue No. 4. The Department agrees and has fulfilled that duty in the instant case.

The allegation that, "The Power company and the Department have oftentimes learned of deficiencies of an application during a hearing" has no bearing herein.

C D. MPC further objects to the various Departmental functions performed in carrying out the Water Use Act. See, MPC issue No. 5. The roles played by various Department offices and employees are reasonable and necessary to administer the Act. Further, the roles of Departmental staff experts, hearing examiner, and final decision makers are contemplated by the Administrative Procedure Act. See, MCA § 2-4-611; 2-4-614(1)(f); 2-4-621.

E. The fact that the precedent relied on by the Department has not been affirmed by a court is of no consequence. See, MPC Issue No. 7. Until that Departmental action is overruled, it remains a valid guideline for the Department in assuring agency actions are reasonable in treating similarly situated applications consistently.

C F. The Show Cause Order neither changes the statutory burden of proof nor deprives MPC of any of its water rights. See, MPC issue No. 8. MPC has not been burdened with any standard of

proof, but merely has been required to do what all objectors must do in order for the right to a hearing to arise - state a valid objection. MPC has been given ample opportunity to submit a valid objection to the Department. It has failed to do so. Hence, the right to participate in a contested case hearing as a party-objector does not arise. § 85-2-309 MCA (1983).

G. The fact that MPC alleges it seeks to protect its ability to generate power for its customers is not germane. See, MPC issue No. 9. MPC's rights and power generation capacity are being protected by the Department already. It simply cannot expand those rights by insinuating the size of its customer base somehow insulates it from the minimum duty of all objectors - to state a valid objection. Every objector and applicant before the Department seeks to protect beneficial uses of water for the benefit of the individual appropriator, customers thereof, or the general public. Where the legislature intends the Department to include economic benefits in the permitting procedure, it expressly so states. See, § 85-2-311(2)(a)(B) MCA (1983). The Permit in issue herein is not subject to that statutory language.

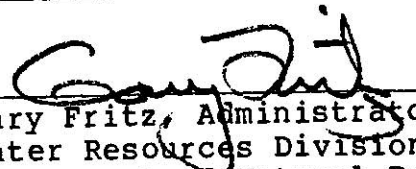
WHEREFORE, based on the foregoing and on the records on file with the Department, the Department hereby issues the following:

ORDER

1. MPC's objections to Application No. 54590-g41B by Michael D. and Diane L. Pearce are hereby declared invalid and are stricken.

2. The other objections filed hereto remain valid.
Therefore, the Department will contact the remaining objectors regarding settlement or hearing in this case.

DONE this 29th day of November, 1984.



Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444 - 6601

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on 11-29-84, 1984, she deposited in the United States mail, certified mail, an order by the Department on the Application by Michael D. and Denise L. Pearce, Application No. 54590-g41B, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Michael D. and Denise L. Pearce, 1205 Flynn Lane, Dillon, MT 59725
2. Montana Power Company, 40 East Broadway, Butte, MT 59701
3. K. Paul Stahl, Gough, Shanahan, Johnson & Waterman, P.O. Box 1715, Helena, MT 59624
4. Selkirk Hereford Ranch, N.C. Hinson, Jr., P.O. Box 2531, Billings, MT 59103
5. Laden Ranch, Ella Laden and Timothy Laden, 1125 Laden Lane, Dillon, MT 59725
6. Robert Meine, c/o Max A. Hansen, P.C., Attorney, P.O. Box 1301, Dillon, MT 59725
7. Peter A. Gaasch, Jr. and James L. Campbell, c/o Max A. Hansen, P.C., Attorney, P.O. Box 1301, Dillon, MT 59725
8. Stanley J. and Katherine M. Ripley, Box 245, Dillon, MT 59725
9. James Blake, c/o Max A. Hansen, P.C., Attorney, P.O. Box 1301, Dillon, MT 59725
10. T.J. Reynolds, Water Rights Bureau Field Manager (inter-departmental mail)
11. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 11-29 day of November, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Lohr

Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3-1-85